Appeal No: 4-02-0443

IN THE APPELLATE COURT
FOR THE FOURTH DISTRICT
STATE OF ILLINOIS

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS,	)	
Plaintiff-Appellant,	)	Appeal from the Seventh Judicial Circuit Court, Springfield, Illinois
v.	)	Circuit Court Case Nos: 99 MR 0333 and 01 MR 00071
ILLINOIS COMMERCE COMMISSION and ILLINOIS RURAL ELECTRIC CO., an Illinois non-for-profit corporation,	)	Trial Judge: Honorable Robert J. Eggers
Defendants-Appellees.	)	

REPLY BRIEF OF PLAINTIFF-APPELLANT CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS

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obtain municipal authority to serve its portion of the annexed area. Reaching this conclusion does not require any "construction" because the language of Paragraph 6 is unmistakably clear on this point. Therefore, IREC has agreed that it "loses" its "map rights" in this scenario by design. There is nothing unfair about this explicit bargain. Further, the operation of Paragraph 6, by allowing resort to the ESA, preserves and protects all of IREC's service entitlement rights under the ESA, including any grandfather rights under Section 5(a) and Section 14; so, again, CIPS has not proposed any construction of the Service Area Agreement that causes IREC to "lose" any "vested" rights.

E. The Legislature Has Unequivocally Directed That Section 5 (a) Grandfather Rights Cannot Impair Or Diminish Municipal Authority "In Any Way"

IREC asserts at II.E. of its Brief (p. 18) that "Section 14 Of The ESA Does Not Affect The Grandfathered Rights To Serve Property Annexed To A Municipality." Presumably, IREC means that Section 14 does not limit the "broad" Section 5(a) rights recognized in Western because Section 5(a) itself makes no reference to annexations. (The Coles-Moultrie case did not involve an annexation situation.) There is no question that Section 14, in a sort of "double-negative" fashion, maintains the Section 5(a) right to serve "customers at locations", even in the event of annexation/incorporation. Recognizing this legislative intent does not, however, resolve the "broad" vs. "narrow" question of the scope of the Section 5(a) grandfathered right nor ensure that the two sections co-exist harmoniously as the courts must attempt to achieve. McNamee v. Federated Equipment & Supply Co., 181 Ill. 2d 415, 427, 692 N.E. 2d 1157, 1163, 229 Ill. Dec. 946, 952 (1998), ("... where there is an alleged conflict between two statutes, a court has a duty to construe those statutes in a manner that avoids an inconsistency ..."). IREC contends that "the legislature has already harmonized grandfathered electric service rights with municipal franchise authority in

favor of grandfathered electric service rights". (p. 19). (emphasis added). IREC appears to argue that because of a conflict between Sections 5(a) and 14, the legislature intended the Section 5(a) grandfather right to prevail.

IREC's argument fails because this Court must strive to avoid finding any conflict between the two provisions, Id. IREC assumes that only Section 5(a) creates "grandfather" rights and ignores the "grandfather provision" of the second sentence in Section 14:

> [a]n electric supplier which is serving in an area which has been or hereafter becomes annexed . . . may continue to furnish service within such annexed . . . area to the premises which it is serving at the time of such annexation . . .

IREC's suggestion that Sections 5(a) and 14 can be harmonized by recognizing that the "broad" Section 5(a) concept of "customers at locations" prevails over any conflicting interpretation of Section 14 flies in the face of the requirement that the courts must construe the statute as a whole and contravenes the courts' duty to construe a statute so as to avoid conflicts, McNamee v. Federated Equipment & Supply Co., 181 Ill. 2d 415, 427, 692 N.E. 2d 1157, 229 Ill. Dec. 946 (1998), and, Kraft, Inc. v. Edgar, 138 Ill. 2d 178, 189, 190, 561 N.E. 2d 656, 661, 149 Ill. Dec. 286, 291 (1996), ("statute should be read as a whole with all relevant parts considered . . .so that no term is rendered superfluous or meaningless").

IREC claims that "CIPS ignores the fact that Section 14 specifically excludes from its operation the first paragraph of Section 5 of the ESA . . . and thus the Section 5 rights to serve all the 'premises' so annexed and being served on July 2, 1965 are not impaired by reason of the annexation." (pp. 18-19). But CIPS expressly pointed out to this Court the exception clauses of Section 14 (Brief and Appendix of Plaintiff-Appellant at p. 13). IREC simply does not want to see

Sections 5(a) and 14 harmonized if that means any contraction of the broad definition of "locations".

F. Miscelleaneous

IREC states that CIPS has cited no Illinois authority for the proposition that "competition existed between cooperatives and utilities prior to the adoption of the Electric Supplier Act . . ." But Justice Craven recognized this circumstance when he observed in Western that

> . . . it clearly appears that one of the purposes was to put to rest the contest between competing utilities as to which would supply what to whom and when. 24 Ill. Dec. 382, 384.

IREC's suggestion that "[i]t is clear that the parties to the Service Area Agreement at issue in this case have used 'locations' and 'premises' interchangeably" (p. 18) absolutely strains credulity. Nothing could be more clear than that the parties' use of the two different terms evidences their unequivocal intent that the terms have separate and distinct meanings, Clay v. Illinois Dist. Council of Assemblies of God Church, Ill. App. 3d 971, 657 N.E. 2d 688, 191 Ill. Dec. 487.

G. No Evidence Warranting Judicial Estoppel Exists

IREC's attempt to impose some sort of judicial estoppel against CIPS (p.16) from the Commission's 1991 decision in Southeastern Illinois Electric Cooperative, Inc. v. Central Illinois Public Service Company is nonsensical. First, CIPS does not contend here that the ESA should not control the result. CIPS agrees that the operation of Paragraph 6 of the SAA, given IREC's lack of franchise authority at the relevant time, means that IREC cannot establish a right to serve based upon any provision of the SAA (including the Paragraph 2 map rights). Second, Sections 5(a) and 5(b) of the ESA grandfather two entirely separate and distinct subjects: "customers at locations," Section 5(a), and "contracts in existence" on July 2, 1965, Section 5(b). Despite its conclusory assertion, IREC advances no rational analysis to illustrate wherein or why CIPS has taken inconsistent

cases.

G. The Customers In Dispute Constitute "Additional Premises" Under Section 14(iii)

The Commission suggests (pp.29-30) that "the three disputed properties in this case all lie within the Schimmel and Bybee premises." There is no fruit on this tree, however, because Section 14 only applies to premises served at the time of annexation. By that time the 1965 Schimmel and Bybee "premises" had been divided into numerous successive premises, none of which were served by IREC on the date of annexation. Accordingly since IREC was not serving the Paxton, et al. premises "at the time of such annexation," and neither Schimmel nor Bybee "own[ed], uses or . . . has some other interest in connection with receiving service" thereon (ESA Section 3.12), the fact that the annexed areas once comprised a part of the Schimmel/Bybee farms does not change the status of Paxton et al. as "additional premises" that IREC "may not furnish service to" without municipal authority under Section 14. In any event, IREC did not make any claim of right to serve the disputed customers herein based on Section 14 in its complaints before the Commission.

III. SUMMARY AND CONCLUSION

Both IREC and the Commission ask this Court to countenance conflicting interpretations of the phrase "customers at locations". The fallacy of such a position should be evident especially in light of this Court's pronouncement that the "commonly accepted meaning" of the phrase is "a particular point at which electricity is being supplied, rather than an entire farm or tract of land . ." IREC and the Commission apparently believe that the General Assembly intended to utilize "customers at locations" in an uncommon and unaccepted fashion contrary to the most fundamental canons of statutory construction. See, e.g., People v. Magette, 195 Ill.2d 336, 747 N.E. 2d 339, 254

Ill. Dec. 299, 307 (2001), (courts "must assume that the legislature intended the term to have its ordinary and popularly understood meaning.") As the Supreme Court stated in Rural Electric Convenience Cooperative Co.:

> [t]he utility of legally binding agreeements between private parties depends upon the degree of certainty with which the parties can predict the meaning of the various terms of their agreement.

Applying a consistent meaning for both the statutory and contractual terms "customers at locations" would provide just certainty with a consequent decrease in litigation among electric suppliers having agreed service area maps.

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